Supreme Court, U.S.
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No. 85-2121

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

STATE OF ARIZONA,

Petitioner,

-vs-

WILLIAM CARL MAURO,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

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30PP

QUESTION PRESENTED

WAS THE ARIZONA SUPREME COURT CORRECT IN REVERSING THE CONVICTION AND SENTENCE OF WILLIAM CARL MAURO BECAUSE A TAPE RECORDING WAS IMPROPERLY ADMITTED AT TRIAL TO PROVE SANITY, IN VIOLATION OF MAURO'S PREVIOUSLY INVOKED FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION, AS IT WAS ILLICIT CUSTODIAL INTERROGATION FOR POLICE OFFICERS, KNOWING THAT THE CONVERSATION WAS LIKELY TO EVOKE INCRIMINATING STATEMENTS, TO ARRANGE FOR MAURO AND HIS WIFE TO CONVERSE, AND TO DELIBERATELY LISTEN TO AND TAPE THAT CONVERSATION?

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OPINION BELOW

The Arizona Supreme Court's ruling is reported at _____ Ariz. _____, 716 P.2d 393 (1986). The opinion is appended in the Petition for Writ of Certiorari, as Exhibit A, and shall not be further appended in Respondent's Brief in Opposition.

STATEMENT OF JURISDICTION

Respondent accepts Petitioner's Statement of Jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts Petitioner's listing of the pertinent portions of the United States Constitution, namely the Fifth, Sixth and Fourteenth Amendments thereto, involved in this petition.

STATEMENT OF THE CASE

Respondent directs this Court's attention to the facts as presented by the record, and synopsized by the Arizona Supreme Court, found in Exhibit A of the Petition for Writ of Certiorari, pages A-2 through A-8. Respondent would capsulize those facts as follows.

William Carl Mauro has a documented history of mental problems, including at least 10 hospitalizations from 1970 through February of 1982. Several of these hospitalizations were quite lengthy, ranging up to several months, despite Petitioner's characterization of these hospital stays as brief. Mauro's most recent hospitalization, nine months prior to the death of his son occurred in Flagstaff, Arizona; however, his mental problems arose substantially before this.

Respondent and his family were very

transient, moving before Mauro could be hospitalized for longer periods of time, and these hospitalizations were in a half a dozen different states.

Mauro's mother had a diagnosed history of bipolar affective disorder, formerly known as manic depressive. Interestingly, William Mauro was diagnosed with the same disorder, as testified to at trial by Mauro's treating psychiatrist. Thus, Mauro's mental state as demonstrated at trial, indicates an individual who was continuously and seriously disturbed prior to the death of David Mauro.

Bill Mauro's behavior had been acting bizzare for four days prior to David's death. Specifically, Mauro was convinced that space creatures were outside the family trailer, waiting to take the souls of his family; he paced the floor all night, was restless and sleepless, "pleading the blood;" his sister-in-law, a

witch, had come in spirit to take over his wife's soul; and he repeatedly rolled around on the floor. For those four days prior to his death, little David had been kept under the bathroom sink, in a cabinet.

On the morning of November 23, 1982, David Mauro died of suffocation. William Mauro placed his body in a suitcase, and left the house. It was a very cold November morning; nevertheless, Mauro wore neither shoes nor coat, which attracted the attention of his neighbors.

After burying the suitcase under a cross of logs in an open field, Mauro went to a nearby K-Mart store. Five or six employees testified that Mauro appeared crazy and delirious; one even said he was foaming at the mouth.

The police arrived, and Mauro continued to claim to have killed his devil-possessed son. He lead the police

to the logs in the field. Partially because of Mauro's bizarre behavior, the police suspected a bomb-hoax. Instead, David's body was discovered, and Mauro was arrested.

Mauro was advised of his Miranda rights, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) in the police car shortly after the body was discovered and once again after arriving at the station. Mauro stated that he did not wish to speak to the police without his attorney present.

Linda Mauro arrived shortly after her husband, and was interrogated in a separate room, at which time she informed the police of Mauro's mental illness history, and of his particularly bizarre behavior during the past four days and shortly after David's death. At the end of questioning, she asked to see her husband.

Detective Frank Manson approached Detective Byron Allen about this unusual request. Manson was against the visit, but Allen allowed it, under the condition that Manson be present and that the conversation be tape-recorded. Linda Mauro agreed to these conditions but Bill Mauro was never informed of them.

When asked why he wanted Manson present, Detective Allen stated it was for security reasons. Allen was still "in the dark" about what happened and he did not want the two to get together and concoct their stories. When asked why the conversation was tape recorded, both Allen and Manson testified that they were aware that Bill or Linda or both might make incriminating statements, and they wanted to record any of those statements. There is no showing by the State that supports any finding that security required an officer to be within listening distance of

the Mauros with a tape recorder running. Clearly, the purpose of the State was to use the face to face confrontation of William and Linda Mauro to elicit incriminating statements.

The Arizona Supreme Court, on direct appeal, reversed the convictions and death sentence of William Carl Mauro, holding that the police officers' conduct in allowing the conversation to even commence was an illicit custodial interrogation, under the "functional equivalent interrogation" test found in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Respondent disagrees with Petitioner's interpretation of the Arizona Supreme Court's holding when Petitioner urges that the Arizona Supreme Court found Wainwright v. Greenfield, 474 U.S. _____, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) as precluding the use of all Miranda-violative statements. The Arizona

Supreme Court did not use Greenfield to make this finding, instead, the Court only ruled that the tape should be suppressed as a violation of Respondent's Miranda rights.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied, inasmuch as the State of Arizona has failed to show any conflicting decisions from other jurisdictions or from this Court where the facts are substantially similar. Clearly, the Arizona Supreme Court's decision falls squarely within the reasoning of this Court in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), in holding that the police conduct was the functional equivalent of interrogation, prohibited by Miranda.

The Arizona Supreme Court did not use Sixth Amendment principles to define the scope of interrogation, as contended by the Petitioner. Further, the Arizona Supreme Court did not hold that the tape recording should be excluded because of due process considerations announced recently in Wainwright v. Greenfield, 106

S.Ct. 634 (1986). The tape was excluded because it violated this defendant's right against self incrimination.

Aside from the lack of conflict, and the correctness of the Arizona Supreme Court's decision, Respondent contends that this case is peculiar in its facts, and that relatively few people would ever be affected by a review of this matter by this Court.

The Arizona Supreme Court found that Mauro's Fifth Amendment rights were violated when the police officers allowed the conversation between the Mauros to commence. That Court recognized that the Fifth Amendment right to counsel is a protection against self-incrimination, citing United States v. Gouveia, _____ U.S. _____, 104 S.Ct. 2292, (1984). That Court further recognized that when a suspect in a custodial interrogation setting invokes his Miranda rights, all

questioning must cease. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

It is clear that Mauro was in a custodial setting at the time of the conversation with his wife, as he had already been arrested, given Miranda warnings twice, and had invoked his right to silence until counsel was present. The question before the Arizona Supreme Court was whether the police officer's conduct amounted to interrogation or its functional equivalent.

In Rhode Island v. Innis, 446 U.S. 291, this Court addressed, for the first time, the meaning of interrogation under Miranda. From that case, interrogation is defined as not only direct questioning, but indirect practices which create an interrogation environment. Id. at 300. Thus, interrogation also refers to

> "any words or actions on the part of the police (other than those normally

> attendant to arrest and custody) that the police should know are reasonably likely to illicit an incriminating response from the suspect." Id. at 301.

In determining whether conduct amounts to the functional equivalent of interrogation, the intent of the police officer and the perception of the suspect are scrutinized. In cases where the trial court must determine whether the officer should have known that his conduct was reasonably likely to elicit an incriminating response, this Court focused on the perceptions of the suspect, rather than the officer's intent. Id. This focus was designed to protect suspects against coercive police practices without placing on them the onerous burden of objectively proving police intent.

However, in footnote 7 of Rhode Island v. Innis, 446 U.S. at 301, the police intent element is not destroyed.

> "This is not to say that the intent of the police is

> irrelevant, for it may well have bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."

The Arizona Supreme Court, based on the testimony of Detectives Allen and Manson, concluded that their intent was crystal clear. Indeed, the illusive objective testimony of intent, which caused this Court to focus on the suspect's perceptions, was actually present in this case, and so strong that it was unnecessary to discuss Mauro's perceptions. However, that state court also recognized that Mauro may well have been unusually disoriented or upset and the police officers may have known that his mental state may have made Mauro

particularly susceptible to this police practice.

Petitioner attempts to claim that the Arizona Supreme Court pinned the Sixth Amendment standard on a Fifth Amendment violation, and that, somehow, use of that standard was incorrect. Petitioner contends that the Arizona Court used the reasoning of Maine v. Moulton, 474 U.S. ____, 106 S.Ct., 477 (1985) to arrive at the conclusion that Mauro's privilege against self-incrimination was violated. A review of that Court's opinion clearly indicates that the reasoning was based upon Fifth Amendment principles, and interrogation was defined by Rhode Island v. Innis, a Fifth Amendment case.

The Arizona Court further explained the rights of a suspect by applying the language in Maine v. Molton, supra, which says that police should not knowingly exploit situations. Obviously, the Court

was highly incensed by the actions of the police officers, and wanted to send a clear message that such conduct was improperly exploitive. Law enforcement should not be able to do indirectly what they cannot do directly. The Arizona Supreme Court also emphasized the control that the Flagstaff police had was also exploitive.

Petitioner would have this Court believe that police officers may not knowingly exploit suspects once the right to counsel under the Sixth Amendment has attached, but may knowingly exploit suspects once the Fifth Amendment right to counsel has been invoked. The Fifth and Sixth Amendments cannot exist in separate vacuums, and the use of a case involving the rights protected under one Amendment is often quoted in a case involving rights protected under another. See, e.g. United States v. Henry, 447 U.S. 264, 100 S.Ct.

2183, 65 L.Ed.2d 115 (1980), Powell concurring. Such a narrow view of constitutional law would constrain courts needlessly.

In Maine v. Moulton, supra, a case wherein Sixth Amendment violations were found, this Court discussed the situation wherein the police and a co-defendant set up Moulton with the use of a concealed wire transmitter. Even though the case was decided upon Sixth Amendment grounds, since the police's knowing exploitation occurred after the Sixth Amendment right to counsel had attached, the same considerations as found in Rhode Island v. Innis, supra, were applied. Footnote 12, 106 S.Ct. at 487, states:

> "Direct proof of the State's knowledge will seldom be available to the accused. However, as Henry makes clear, proof that the State "must have known" that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation. See

Henry, 447 U.S., at 271, 100 S.Ct. at 2187."

Lastly, Petitioner attempts to read the Arizona Supreme Court's decision to hold that all Miranda-violative statements are inadmissible after this Court held, in Wainwright v. Greenfield, supra, that post-arrest, post-Miranda warnings silence may not be used as evidence of sanity. Respondent contends this is an incorrect interpretation of the Arizona Supreme Court's opinion. In fact, just the opposite is true.

The Arizona Supreme Court, in footnote 1, p. A-33 of Petitioner's Exhibit A, specifically notes that perhaps some of the statements may (or some may not) be violative of due process rights as deliniated in Greenfield. However, the entire conversation was eliminated, so each individual statement did not need to be analyzed.

However, the Arizona Supreme Court

did want to give some direction to the trial court as to what could be done with this conversation. That Court held that the tape could not be used as evidence at trial; it could be used, however, by the psychiatrists determining Mauro's sanity at the time of the crime. That Court further desired to set the parameters for use of the tape when it directed the trial court to allow the state to carefully frame its questions to avoid any mention of Mauro's exercise of any constitutional rights, or any violations of Mauro's constitutional rights.

This rationale was based upon Greenfield, and the Arizona Court held that it would be fundamentally unfair for the state to use the words of the defendant when the tape had been excluded. The state may bring out, however, that Mauro was able to speak rationally. Again the state is attempting to do indirectly

what it cannot do directly - introduce the words of the tape when the tape has already been properly excluded.

CONCLUSION

This Court should deny the State of Arizona's Petition for Writ of Certiorari. No conflicting decisions from other jurisdictions have been brought to this Court's attention. Further, the decision of the Arizona Supreme Court was clearly correct, under Rhode Island v. Innis. The conduct of the police officers blatantly amounted to the functional equivalent of custodial interrogation, since the officers, by their own testimony, clearly knew allowing the conversation between Mauro and his wife was reasonably likely to elicit incriminating responses from Mauro, his wife or both. Mauro's perceptions were not even considered, so clear was the intent.

The case was not decided on improper grounds merely because a Sixth Amendment case, Maine v. Moulton, was used to condemn the knowing exploitation by police

of an opportunity they ordinarily would not have. The case was decided squarely on Fifth Amendment principles, as being Miranda-violative.

Lastly, there was no extention of Wainwright v. Greenfield to exclude all Miranda-violative statements based upon due process grounds. The statements were excluded because of Fifth Amendment grounds. However, Petitioner attempts to circumvent that ruling by saying that the statements should be admitted to show evidence of sanity - again an attempt to do indirectly what it cannot do directly.

Respectfully submitted,

RATNER & WALSH

By Kathleen Kelly Walsh
Kathleen Kelly Walsh

Attorneys for RESPONDENT

A F F I D A V I T

STATE OF ARIZONA)
) ss.
County of Coconino)

KATHLEEN KELLY WALSH, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That she served three copies of the Brief in Opposition upon Georgia Butcher Ellexson, Assistant Attorney General, Department of Law, 1275 West Washington, Phoenix, Arizona 85007, Attorney for State of Arizona, by depositing the same in the Unites States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, she herewith certifies that service of three copies of this Brief has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to the Solicitor General, Department of

Justice, Washington, D.C. 20530.

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SUBSCRIBED AND SWORN to before me this 16 day of July, 1986.

Michelle Ratner

MICHELLE RATNER
NOTARY PUBLIC

My Commission Expires:

November 19, 1986